90-294

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BILL SANDLIN,

Petitioner,

versus

TEXACO REFINING AND MARKETING, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT CERTIORARI

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August 1990

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Tenth Circuit properly adopted a test for liability under the Petroleum Marketing Practices Act when the new test is virtually identical to a standard specifically rejected by Congress?

2. Whether the United States Court of Appeals for the Tenth Circuit followed the proper standard of review when it reweighed the evidence and reassessed the credibility of witnesses to reverse and remand the jury's verdict and the district court's judgment in Petitioner's favor.

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REPORTS OF OPINIONS OF LOWER COURTS

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at Sandlin v. Texaco Refining and Marketing, Inc., 900 F.2d 1479 (10th Cir. 1990). The opinions of the United States District Court for the Western District of Oklahoma are not published and are copied in the Appendix hereto.

STATEMENT OF JURISDICTION

Judgment of the Court of Appeals was rendered and entered April 6, 1990 and Petitioner sought rehearing, which was denied by order filed May 16, 1990.

This Petition for Writ of Certiorari is brought pursuant to the provisions of Title 28, United States Code, Section 1254(1).

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Relevant to this Petition is the following statute: 15 U.S.C. § 2801, et seq. The pertinent portions of this statute are set forth below.

§ 2802. Franchise relationship

General prohibition against termination or nonrenewal

(a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may --

* * *

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

* * *

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

* * *

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if --

(i) such determination is --

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either --

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase said franchisor's interest in such premises.

§ 2805. Enforcement provisions

Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

(a) If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of --

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

* * *

Burden of proof;
burden of going forward with evidence

(c) In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

STATEMENT OF THE CASE

Petitioner, Bill Sandlin, ran a gas station and was an excellent franchisee of Respondent Texaco Refining & Marketing, Inc., in Moore, Oklahoma, from 1982 until May 1986. Respondent acquired a station across the street from Petitioner, rebranded it as a Texaco station, sold gas retail at that particular location for less than its wholesale price to Petitioner, diverted business from its franchisee and chose not to renew his lease thereby acquiring the business he built.

Petitioner filed suit under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, et seq. ("PMPA"), alleging Texaco's decision to nonrenew his

lease was not made in good faith. Petitioner also alleged a pendent state claim: breach of the implied covenant of good faith and fair dealing implicit in every contract in Oklahoma. The United States District Court for the Western District of Oklahoma had jurisdiction to hear these claims pursuant to 28 U.S. § 1331 and its jurisdiction to hear pendent state law claims.

Petitioner received jury verdicts in his favor on both claims. He established his PMPA claim on stipulated facts and the jury did not accept Texaco's evidence of its affirmative defense. Texaco moved for a directed verdict at trial and filed Motions for a New Trial and

for Judgment N.O.V. afterward. The United States District Court for the Western District of Oklahoma overruled all Motions and entered judgment in Petitioner's favor.

Following Respondent's appeal, the United States Court of Appeals for the Tenth Circuit reversed and remanded the case with directions to enter judgment in Respondent's favor. The Tenth Circuit rejected the findings of the jury and the Chief Judge of the Western District of Oklahoma and ruled that there was no evidence to support either of Petitioner's two claims. In doing so, the Tenth Circuit departed from existing precedent in the following manner:

(a) It invented and used a new test to determine liability under PMPA -- Texaco's "honest commercial judgment" -- to assess Petitioner's claim and Respondent's defense. This test is indistinguishable from a standard specifically rejected by Congress in drafting the PMPA. None of the 348 federal appellate decisions mentioning the PMPA employ a standard of "honest commercial judgment";

(b) It applied an incorrect standard for reviewing jury verdicts and denials of motions for directed verdict, new trial and judgment n.o.v. The Tenth Circuit held that the "totality of the evidence" must support the jury's verdict. Petitioner met his burden on the PMPA claim on stipulated facts. An issue on appeal was whether there was any evidence from which a jury could conclude Respondent did not prove its affirmative defense; and

(c) It improperly weighed evidence and repeatedly assessed the credibility of witnesses to reach its conclusion.

Copies of the various judgments and orders of the lower courts appear in the Appendix hereto.

ARGUMENT

PROPOSITION I

Congress Rejected A Liability Standard Virtually Identical To The Test Used By The Tenth Circuit.

The Petroleum Marketing Practices Act, 15 U.S.C. § 2801, et seq., ("PMPA") was enacted in 1978 to establish minimum federal standards to govern the termination and nonrenewal of franchise relationships for the sale of motor fuel by the supplier of the fuel. S. Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Admin. News, 873. Under the PMPA a leasehold relationship such as the one

between Petitioner and Respondent is defined as a franchise; Respondent is labeled a franchisor and Petitioner a franchisee. 15 U.S.C. § 2801. The PMPA was intended to prohibit a franchisor, such as Respondent, from failing to renew the franchise relationship except for certain specific permissible reasons stated in the Act. This is to protect franchisees from arbitrary or discriminatory terminations and to fulfill their reasonable expectations of renewal. S. Rep. No. 731, supra at 18, reprinted at 877.

The Tenth Circuit adopted a new test -- a franchisor's "honest commercial judgment" -- as the standard to determine a violation of the act. The Senate

specifically rejected the use of a similar test -- a franchisor's "reasonable business judgment" -- as grounds for termination or nonrenewal. In his dissent, Justice Brorby recognized that the majority invented a test virtually identical to the one rejected by Congress.

> I cannot distinguish between the majority's 'honest commercial judgment' standard and the 'reasonable business judgment' test clearly rejected by Congress. Thus, in my view the majority have burdened franchisees -- and the courts -- with an inquiry Congress meant to avoid. (Dissenting Opinion, at p. 2)

Moreover the legislative history of the PMPA shows that Congress rejected the "reasonable business judgment" test to avoid judicial scrutiny of the business

judgment itself -- something the majority's new test invites.

> At this point it is appropriate to note that considerable debate has focused upon recognition of so-called 'reasonable business judgments' of the franchisor as grounds for termination or nonrenewal. This standard has not been adopted by the committee. Instead, a two-fold test has been utilized to judge certain specified determination including that of market withdrawal . . . . These tests [of good faith and normal course of business] provide adequate protection of franchisees from arbitrary or discriminatory terminations or nonrenewals, yet avoid judicial scrutiny of the business judgment itself. (S. Rep. No. 731, supra at 37, reprinted at 895-96.)

Despite the clear legislative history of the PMPA, the Tenth Circuit chose to adopt a completely new test which is not materially different from the one expressly

rejected by Congress. Petitioner presented evidence that Respondent's marketing manager said, "To hell with Bill Sandlin, we can make more money with a direct operation." The Tenth Circuit's decision puts the stamp of approval on such predatory intent because it is a sound commercial judgment. The Court held:

> Indeed, the purported statement is irrelevant to the inquiry of whether the decision is grounded in [Texaco's] honest commercial judgment. When faced with the FTC ruling, [Texaco] clearly had to dispose of one of the two stations. The remaining question, then, is whether the choice of the Sandlin station was grounded in commercial judgment or predicated upon an impermissible ground. (Opinion, fn. 1, p. 6, emphasis added)

Good faith under the PMPA means that a franchisor may not have a discriminatory motive even if such a move could be justified in a purely commercial context. The legislative history of the PMPA indicates that courts should look to the franchisor's subjective intent rather than to the effect of its actions. Svela v. Union Oil Company, 807 F.2d 1494, 1501 (9th Cir. 1987); Valentine v. Mobil Oil Company, 789 F.2d 1388, 1392 (9th Cir. 1986). Petitioner's evidence permitted a jury finding that Respondent's subjective intent was to avoid renewal in order to take his business. The jury concluded Respondent's decision was not made in good faith. This permissible finding of fact is destroyed

through the Tenth Circuit's invention and use of a new "honest commercial judgment" test.

PROPOSITION II

Petitioner's Claim And Evidence Controverted Respondent's Affirmative Defense.

Petitioner established his *prima facie* case for PMPA violation on stipulated facts. Therefore, the issue for the Tenth Circuit was whether there is any inference which can be drawn to show that Respondent's decision to nonrenew Petitioner was not in good faith because it discriminated against him by treating him differently from other retailers. It did so in order to take away his business. At the Respondent's retail review meeting in

February 1985, Respondent looked at its different locations to determine what could be done to improve the retailer's business. It contemplated changes to the locations to enhance sales. Petitioner, however, was uniquely not considered in this regard during Respondent's review of his business. Respondent dealt with its relationship to him as though it was disposing of a mere piece of property, not dealing with a "franchise relationship" protected by the PMPA. Respondent nonrenewed his lease and drove him from business because of its own economic best interest. Its marketing manager said "to hell with him; you know, we can make more money this way, so to hell with Bill."

Respondent's Assistant Regional Marketing Manager admitted Respondent would act in bad faith if it decided to replace Petitioner's operation with a company-run unit or nonrenewed him based on an evaluation that a company-run unit would be more economical. There was substantial evidence from which the jury could conclude that this is exactly what happened. Respondent considered the intersection as one marketing premises; the stations were in "direct conflict"; Respondent performed an economic analysis; and concluded, "we can make more money with a direct operation".

While Respondent's self-serving notice of nonrenewal stated that it had decided

"to sell" Sandlin's station, the evidence was disputed whether Respondent's decision "to sell" was a sham and a pretext for its desire to drive him from business in order to capitalize on his efforts. Contrary to the language in the Tenth Circuit's majority opinion, Respondent was not "required" to sell one of the two stations by the Federal Trade Commission. Respondent wanted to retain the market for itself and eliminated Petitioner to achieve a higher profit. He had dramatically improved Respondent's business at this location. Respondent had the opportunity to capitalize on Petitioner's efforts at his expense and it did so. Petitioner's evidence addressed these issues and

controverted Respondent's affirmative defense. The jury believed this evidence. It was the jury's decision to make under the circumstances.

PROPOSITION III

The Tenth Circuit Applied An Improper Standard Of Review In Evaluating All Issues.

In its opinion, the Tenth Circuit applied inconsistent standards. The proper standard for reviewing denials of motions for directed verdict and j.n.o.v. is a de novo review to determine whether a jury could find for the prevailing party, viewing all evidence in the light most favorable to the appellee. However, the standard actually used by the Tenth Circuit

involved reweighing the evidence. The Court stated:

> [t]he first question presented is whether the totality of the evidence supports the verdict that [Texaco's] decision not to renew its franchise was not made in good faith and in a normal course of business as required by the PMPA. (Opinion, April 6, 1990 at pp. 4-5, emphasis added.)

ĀAs Justice Brorby states in his dissenting opinion, the totality of the evidence test is an:

> overgeneralization of the applicable standards of review . . . it is reminiscent of a 'totality of the circumstances' test, which is inappropriate here. (Dissenting opinion at pp. 1-2.)

The Tenth Circuit should not have weighed the evidence, passed upon the credibility of witnesses, or substituted

its judgment for that of the jury. Brown v. McGraw-Edison Co., 736 F.2d 609, 612-13 (10th Cir. 1984). The Tenth Circuit should not have reversed the denial of a directed verdict or j.n.o.v. motion unless the evidence was susceptible to no reasonable inferences which may sustain the position of the party opposing the motion. Anderson v. Phillips Petroleum Co., 861 F.2d 631, 634 (10th Cir. 1988). Nor should the Tenth Circuit have reversed a trial court's denial of a new trial unless the verdict was clearly, decidedly or overwhelmingly against the weight of the evidence. Brown, 736 F.2d at 616.

The Tenth Circuit's announced standard is inconsistent and irreconcilable with the

proper standards of review. Because the Tenth Circuit clearly used an improper standard of review, Petitioner prays for a writ, reversal and remand.

PROPOSITION IV

The Tenth Circuit Improperly Weighed The Evidence And Determined Credibility Of Witnesses.

Throughout its opinion, the Tenth Circuit reviewed the testimony of witnesses presented by both parties. To reach its conclusion, however, the Tenth Circuit was required to denigrate the testimony of Petitioner and his witnesses and to treat Respondent's version as if it were unrebutted.

At footnote 1 of its opinion, the majority of the Court implied that it questioned whether certain Respondent's management personnel actually made the statement "to hell with Sandlin." The Court also second guessed the jury in assessing the impact of this evidence and states that it is "irrelevant to the inquiry of whether [Texaco's] decision is grounded in [its] honest commercial judgment." Because the Court concludes that Respondent established a "sound commercial reason" for the nonrenewal, the evidence of Respondent's subjective intent toward Petitioner is simply and improperly disregarded.

Whether the remark ever occurred (and the inferences from the remark under the circumstances) are questions of fact for the jury. The subjective intent evidenced by such a remark during a franchise meeting where the conclusion was drawn that Respondent could make more money by discarding Petitioner is also a question for the jury. Whether Respondent had a "sound commercial reason" for doing what it did is not the point. Many predatory and wrongful business practices make sense commercially. That is the very reason remedial legislation is often necessary.

The Tenth Circuit placed unqualified reliance on Respondent's assertion that it was required to dispose

of one of the two stations which it did due to FTC rulings. (Opinion at fn. 1, p. 6.) There was no evidence at trial regarding the FTC's ruling other than the statements of one witness that he had read about FTC decisions in the Wall Street Journal and had been informed of them by someone in management. Contrary to the Tenth Circuit's conclusion that the FTC required Respondent to sell one location, Respondent's assistant marketing manager testified that the FTC allowed Respondent to keep both stations. This witness testified that Respondent could have operated both stations as Texaco locations. The Tenth Circuit rejected the jury's determination and gave full weight

to "evidence" that Respondent presented in its appellate brief but declined to offer to the jury. The jury's decision should not have been reversed due to evidence that the jury never heard.

The Tenth Circuit blatantly weighed Petitioner's testimony that he expected to stay in business for another ten years and assessed his credibility by concluding his remarks were "self serving." The Court concluded that the PMPA does not protect that kind of hope or speculation. Inconsistently, the Court went on to recognize that the PMPA attempts to balance Petitioner's "reasonable expectations" with the franchisor's legitimate business reasons. Petitioner's expectations of

future prosperity were not weighted in a vacuum. Given the uncontroverted proof of his improved business at the location, his approval by Texaco supervisors and the assurances of an ongoing relationship given by Texaco personnel, the extent of Petitioner's "reasonable expectations" was a question of fact for the jury. His testimony was not mere "speculation" given these facts.

The Tenth Circuit also impermissibly weighed the evidence and assessed the credibility of witnesses in passing on Petitioner's state law breach of contract claim. It characterized Petitioner's testimony as "self-serving speculation" and found that there was no evidence to

indicate that Respondent breached the franchise agreement by bad faith or unfair dealing. The Court noted that Petitioner presented evidence that Texaco marketed its gas at the competing company station across the street for less than it charged him for gasoline on a wholesale basis. The Tenth Circuit characterized this evidence as "mere speculation." This conclusion simply ignores Petitioner's testimony that he was present at his station, that he could see Texaco's prices were lower than his wholesale prices and that the company station was diverting his business. It also ignores Petitioner's testimony that he complained to Texaco about the practice and was told only, "that's the way we do business."

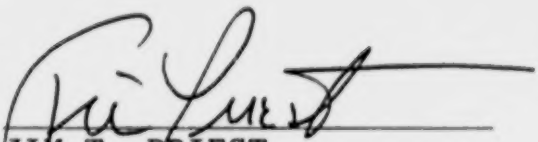
The jury was asked to determine whether Petitioner's evidence was believable and to give it such weight as they thought it deserved. Contrary to the jury's decision, the Tenth Circuit concluded that the evidence was "nothing more than the consequence of the Getty-Texaco merger which ultimately put Texaco in the posture of competition with its own franchisee." The Tenth Circuit's explanation does not account for the evidence of Texaco's pricing practices, however. The jury concluded that Texaco's competition was unfair since it undercut Sandlin's prices. The Tenth Circuit should not have substituted its judgment for that of the jury.

CONCLUSION

The United States Court of Appeals for the Tenth Circuit reversed and remanded a jury's verdict which had been approved by the district judge who conducted the trial. In order to do so, it had to reweigh the evidence and reassess the credibility of key witnesses. As even the Tenth Circuit's majority conceded as an abstract proposition, this is not the function of an appellate court.

For all of these reasons, Sandlin petitions the Court to issue a writ of certiorari and to reverse the judgment of the United States Court of Appeals with

directions to reinstate the District Court's verdict and judgment.



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 1990, a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been mailed to the following:

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8455b

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BILL SANDLIN, Plaintiff-Appellee,	)	
v.	)	Nos. 88-1764 and 88-1874
TEXACO REFINING AND MARKETING, INC. Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
D.C. Nos. 86-1032-T, 86-1032-AR

George D. Davis (Robert D. Tomlinson and David W. Kirk on the briefs) of McKinney, Stringer & Webster, P.C., Oklahoma City, Oklahoma, for Plaintiff-Appellee.

G. Kenneth Handley of Texaco Inc., White Plains, New York, (Terri J. Frank of Texaco Inc., White Plains, New York; R. Steven Haught of Daugherty, Bradford, Fowler & Moss, Oklahoma City, Oklahoma City, Oklahoma; and Thomas J. Goodwin, Houston Texas, with him on the briefs) for Defendant-Appellant.

Before MOORE, BRORBY, and EBEL, Circuit Judges.

MOORE, Circuit Judge.

Texaco Refining and Marketing Inc., (TRMI) appeals an adverse judgment entered for violation of the Petroleum Marketing Practices Act (PMPA) and for state breach of contract claims. TRMI contends the jury verdict is not supported by the evidence, and the trial court erred in denying its motions for directed verdict, judgment notwithstanding the verdict, and for a new trial. TRMI also appeals the trial court's award of attorney fees to the plaintiff. We reverse.

The nonrenewal at issue here was spawned by the 1984 merger of Texaco Inc. and Getty Oil Company. As a result, TRMI acquired a service station bearing the

Getty name across the street from its existing Texaco station which was operated by its franchisee, Mr. Bill Sandlin, under a three-year franchise agreement with TRMI. In reviewing the merger, the Federal Trade Commission required both Texaco and Getty to divest themselves of certain assets, including the use of the Getty name. (R. II, 164-69). Consequently, the Getty station was rebranded and began doing business under the Texaco name in July 1985. (R. II, 171).

In January 1986, TRMI notified Mr. Sandlin under § 2802(b)(3)(D)(i)(III) it would not renew the franchise because it decided to sell the leased premises "in

good faith and in the normal course of business." Soon after, TRMI sent a written offer to sell the property for $216,000.

At trial, Mr. Sandlin, alleging TRMI violated the PMPA and breached its duty of good faith and fair dealing implied in the contract, sought to prove that TRMI's substantive decision to nonrenew was not made in good faith and in the normal course of business, and its offer to sell the station was not bona fide. Throughout, evidence probative of statutory "good faith" was intermingled with evidence of whether the offer of sale was bona fide and the contract was performed in good faith. However, when the evidence is properly

aligned under the PMPA, there is neither factual nor inferential basis on which the jury could properly find a verdict for Mr. Sandlin on his claim that TRMI violated the PMPA.

Resolution of the issues before this court brings into focus the purposes behind the statute with which we deal. The PMPA generally prohibits the arbitrary and discriminatory termination or nonrenewal of a franchise. It further enacts certain remedial provisions to protect the franchisee from any harm resulting from nonrenewal. Under the statutory scheme, nonrenewal is neither prohibited nor punished. Instead, nonrenewal is permitted

if, after proper notification, the franchisor tethers the decision to one of the statutorily permitted grounds for termination. 15 U.S.C. § 2802. Additionally, under 15 U.S.C. § 2802(b)(3)(D)(i)(III), Congress imposed a duty on a franchisor, whose nonrenewal of the franchise relationship is grounded on the decision to sell the marketing premises, to make "a bona fide offer to sell . . . to the franchisee such franchisor's interests in such premises . . . . " 15 U.S.C. § 2802(b)(3)(D)(iii)(I). To vitiate a claim under this subsection, TRMI has the "burden of going forward with evidence to

establish as an affirmative defense that such termination or nonrenewal was permitted," 15 U.S.C. § 2805(c), and satisfied its statutory duty to make a bona fide offer to sell.

It is essential to recall Congress did not intend to intrude courts into the marketplace by permitting "judicial second-guessing of the economic decisions of franchisors." Svela v. Union Oil Co. of Calif., 807 F.2d 1494, 1501 (9th Cir. 1987). While Congress intended the good faith test to prevent franchisors from shielding their decisions with artifice, the normal course of business element examines whether the franchisor made the

choice through its usual decision-making process. "The legislative history of the PMPA indicates that courts should look to the franchisor's intent rather than to the effect of his actions, making [the good faith test] a subjective test." Svela, 807 F.2d at 1501 (citation omitted). However, we use an objective test to decide whether an offer is bona fide. See Slatky v. Amoco Oil Co., 830 F.2d 476 (3d Cir. 1987).

> The "good faith and normal course of business" requirement is essentially a procedural direction to the courts about how to judge whether the distributor has abided by the substantive restrictions and failed to renew only because of one of the statutorily permitted

> reasons. Thus, what the court decides in a challenge to a non-renewal is not whether the distributor determined not to renew according to some elusive notion of good faith but whether it sincerely made a decision to sell the property or to alter it or to accomplish some other business purpose permitted under the statute.

Id. at 482.

I.

The first question presented is whether the totality of the evidence supports the verdict that TRMI's decision not to renew its franchise was not made in good faith and in the normal course of business as required by PMPA. We also consider whether the evidence supports the verdict that an

offer by TRMI to sell its station to Mr. Sandlin was not bona fide. We find no evidence in support of either proposition.

We arrive at this conclusion after undertaking an analysis of the two facets that comprise a claim for violation of the PMPA. The initial inquiry, whether the franchisor made the substantive decision in good faith and the normal course of business, tests the honest commercial judgment of the franchisor. In contrast, the second evaluates whether the franchisor fulfilled its remedial obligation to the franchisee by making a bona fide offer to sell the premises. Whether this subsequent offer is bona fide questions the fairness

of the franchisor's treatment of the franchisee measured by an objective standard. "The bona fide offer provision therefore serves as a second, and distinct, layer of protection, assuring the franchisee an opportunity to continue to earn a livelihood from the property while permitting the distributor to end the franchise relationship." Id. at 484.

Thus, two separate inquiries must flow from a PMPA test of a nonrenewal decision. Evidence of the first is not evidence of the second, not only because the two inquiries are temporally separated but also because the standards for judging both differ.

TRMI presented evidence of management's procedure of reviewing its stations in general and these two competing stations in particular. In addition, TRMI set forth its procedure for appraising the property and the circumstances of the offer made to Mr. Sandlin.

In contrast, Mr. Sandlin sought to prove that TRMI treated him unfairly and that its decision to acquire the Getty station was motivated by its desire to profit from his success in building up his business and good will in that location.[1] To that end, Mr. Sandlin related his expectations of remaining in business "if I did good," (R. II, 105), and

various promises or proposed alternatives and commitments that TRMI agents made prior to the decision to sell and the formal notice of that decision.

Intertwined in this testimony of TRMI's intent was evidence of TRMI's offer to sell. While a franchisor could make a bona fide offer to sell the /premises, it is possible that the underlying decision to sell was not made in good faith and in the normal course of business. Since the statute imposes two tests to support a valid nonrenewal, a bona fide offer alone is not sufficient to cure an otherwise arbitrary nonrenewal decision. Care must

be taken not to use the evidence relevant to one test as evidence applicable to the other.

When the record is viewed with that distinction in mind, there is no evidence to be found from which the jury could conclude that TRMI's written offer to sell the premises for $216,000 was not bona fide. First, Plaintiff's Exhibit 6 details appraisals of the property ranging from $200,000 to $233,535.[2] Second, the $216,000 price included the tanks, lines, and equipment; $200,000 for the land, $16,000 for the additions.[3] Finally, after Mr. Sandlin refused the offer, TRMI received an offer of $260,000 from another

entity, which subsequently lapsed when the offeror was itself sold. Thereafter, TRMI listed the property for $260,000, and that listing was in effect at the time of trial.

No matter how the evidence is viewed, the $216,000 offer remains objectively reasonable as a reflection of fair market value. "That, by definition, is the highest price a willing buyer would pay, and an offer at fair market value protects the franchisee's reasonable expectation of being able to make a living with the franchise property." Slatky, 830 F.2d at 484. Congress intended no more. "Congress treated the bona fide offer requirement not as a statutory recognition of a business

judgment but as a form of compensation to the franchisee for the harm resulting from the distributor's valid business judgment." Id. at 481-82.

Similarly, Mr. Sandlin's self-serving testimony that he expected to stay in business for ten years, cannot substitute for the PMPA's provisions for the nonrenewal decision. (See R. II, 107). The PMPA does not protect that kind of hope or speculation. Instead, the PMPA attempts to balance the franchisee's "reasonable expectations" with the franchisor's legitimate business reasons. Id. at 484. That the nonrenewal at issue has the effect of altering those expectations alone cannot

taint TRMI's action.[4] "So long as the franchisor does not have a discriminatory motive or use the altered terms as a pretest to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith." Valentine v. Mobile Oil Corp., 789 F.2d 1388, 1392 (9th Cir. 1986) (PMPA does not entitle franchisee to buy station if franchisor proposes material alteration of the premises which franchisee opposes). Recognizing the standard of review which guides the court's analysis,[5] we must conclude no evidence or reasonable inferences from the evidence can shore up the jury's verdict.

II.

Mr. Sandlin also recovered a judgment on state claims under theories of breach of contract. TRMI argued in the trial court that the state claims were preempted by PMPA, but that argument has not been asserted on appeal.[6]

Except for some self-serving speculation by Mr. Sandlin,[7] we find no evidence in the record indicating TRMI breached the franchise agreement by bad faith or unfair dealing. In support of his claim that TRMI breached the good faith covenant inherent in every contract, see Hall v. Farmers Ins. Exch., 713 P.2d 1027, 1029-31 (Okla. 1985); Christian v. American

Home Assurance Co., 577 P.2d 899, 904 (Okla. 1977), Mr. Sandlin refers to the testimony of one witness who stated the rebranding of the Getty station took place earlier than necessary. He also contends TRMI marketed its gas at less than it charged him and that it took an "unconscientious" advantage of him through a "technicality" in the law. Unfortunately for Mr. Sandlin's cause, this "evidence" fails to rise above mere speculation.

The events Mr. Sandlin perceived as harmful to him were nothing more than the consequence of the Getty-Texaco merger which ultimately put TRMI in the posture of competition with its own franchisee. That

competition is not the substance of a state breach of contract claim, even if such a claim is not preempted by PMPA, because Mr. Sandlin was unable to present evidence to the jury which suggests TRMI competed in bad faith.

The judgment of the district court is REVERSED and REMANDED with instructions to enter judgment in favor of TRMI on all claims.

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FOOTNOTES

[1] Reappearing in this testimony is the alleged but denied statement, "to hell with Sandlin," made by a top TRMI management official responsible for the decision to sell. Even if the statement referred to TRMI's decision to sell, which is questionable, it is difficult to see how that decision, under all the circumstances of this case, is premised on the franchisor's spite. Indeed, the purported statement is irrelevant to the inquiry of whether the decision is grounded in TRMI's honest commercial judgment. When faced with the FTC ruling, TRMI clearly had to dispose of one of the two stations. The remaining question, then, is whether the choice of the Sandlin station was grounded in commercial judgment or predicated upon the impermissible ground. Given the evidence which established the superior profitability of the former Getty station, TRMI established a sound commercial reason for the decision not to renew. The alleged statement simply did not controvert this reason.

2 A suggestion abounds that appraisals ranged from $97,000 to $233,000. Plaintiff's Exhibit 6, a copy of TRMI's internal real estate analysis, lists outside appraisals of $200,000 (12/84) and $210,000 (8/84) without the tanks and equipment; and $223,535 (12/84) and $233,535 (8/84) with the tanks and equipment. The $97,422 figure in Exhibit 6 reprsents "cost less reserves (6/85)." That figure cannot be an appraisal of value because, in the absence of explanatory evidence, the statement "cost less reserves" must be taken at face value. Thus, the figure of $97,422 cannot represent an appraised value of the station.

3 An oral offer or "proposal" to sell the premises made to Mr. Sandlin in May 1985 for $269,000 would not qualify as an offer to sell under the PMPA because it predated formal notice. That offer, according to then existing company policy, did not include the underground tanks and liens although the company offered to decrease the price by half of the cost of installing new equipment if the existing equipment was defective. (R. II, 277). However, a TRMI witness testified that company policy changed, permitting Mr. Sandlin

to purchase the equipment if it passed leakage and tightness tests. (R. II, 278).

4 For example, the Ninth Circuit affirmed a judgment for the franchisor whose nonrenewal was based on the decision to convert the station from a full-service to a fast-service facility. The court upheld the nonrenewal under the PMPA, observing "the fact that Union's proposed changes might make it difficult for Svela to remain in business and earn a profit is irrelevant to a finding of good faith." Svela, 807 F.2d 1494, 1501 (:9th Cir. 1987) (citation omitted).

5 We judge whether a motion for judgment n.o.v. should have been granted upon a de novo review of the record to determine whether a jury could properly find for the prevailing party. In performing this task, we do not weigh the evidence or pass upon the credibility of the witnesses, and we view the evidence in a light most favorable to the Appellee. Anderson v. Phillips Petroleum Co., 861 F.2d 631 (10th Cir. 1988); Brown v. McGraw-Edison Co., 736 F.2d 609 (10th Cir. 1984).

6 On the issue of preemption, see Cason v. Texaco Inc., 621 F. Supp. 1518 (M.D. La. 1985); Siecko v. Amerada Hess Corp., 569 F. Supp. 768 (E.D. Pa. 1983).

7 For example, Mr. Sandlin stated on "certain days and certain times" he saw posted prices at TRMI's neighboring station that were lower than his purchase price. Without more, this is not evidence the TRMI set those prices intentionally to harm Mr. Sandlin or that the prices were set in an effort to take an unfair advantage of him.

7414a

BRORBY, Circuit Judge, dissenting.

The standards that govern our review of a jury verdict are strict. We "may not weigh the evidence, pass upon the credibility of witnesses, or substitute [our] judgment for that of the jury," Brown v. McGraw-Edison Co., 736 F.2d 609, 612-613 (10th Cir. 1984). We may not reverse the denial of a directed verdict or JNOV motion unless the evidence "is susceptible to no reasonable inferences which may sustain the position of the party" opposing the motion. Anderson v. Phillips Petroleum Co., 861 F.2d 631, 634 (10th Cir. 1988). Nor may we reverse a trial court's denial of a new trial unless the verdict is "clearly, decidedly, or overwhelmingly against the weight of the evidence."

Brown, 736 F.2d at 616. Judged by these tests, I cannot say the jury's verdict on either of Sandlin's claims is erroneous. Thus, I must respectfully dissent from the majority's opinion.

The effect of the majority's opinion -- of its recapitulation of the evidence and its formulation of the issues and the law to be applied -- is to place a disproportionate evidentiary burden on the appellee Bill Sandlin. For example, the majority state that the "first question presented is whether the totality of the evidence supports the verdict." Opinion at 4 (emphasis added). I view this as an over-generalization of the applicable

standards of review, which I have laid out above. It is reminiscent of a "totality of the circumstances" test, which is inappropriate here, and it suggests the majority are reweighing the evidence -- a job reserved to the jury.

The majority's formulation of the federal statutory requirements also serves to place an unintended hurdle in the path of a plaintiff frachisee. As the majority correctly point out, "Congress [in the PMPA] did not intend to intrude courts into the marketplace." Opinion at 4. In fact, Congress considered "reasonable business judgments" as a ground for nonrenewal of a franchise, but rejected it in favor of the

good faith and normal course of business tests, which would "avoid judicial scrutiny of the business judgment itself." S. Rep. No. 731, 95th Cong., 2d Sess., at 37, reprinted in 1978 U.S. Code Cong. & Admin. News 873, 895-96. In spite of this history, the majority interpret the two statutory inquiries as "test[ing] the honest commercial judgment of the franchisor." Opinion at 5. I cannot distinguish between the majority's "honest commercial judgment" standard and the "reasonable business judgment" test clearly rejected by Congress. Thus, in my view the majority have burdened franchisees -- and

the courts -- with an inquiry Congress meant to avoid.

The majority also disregard certain evidence offered by Sandlin and characterize other evidence in such a way as to reduce its weight in his favor. Two examples suffice to demonstrate this problem. First, I do not view Mr. Sandlin's expectation of staying in business for ten years as simply "hope or speculation," Opinion at 8, if viewed in light of other evidence -- evidence of Sandlin's increasingly profitable business, TRMI's satisfaction with him as a franchisee, and commitments and assurances made to him by agents of TRMI. From this

and other evidence, the jury could have concluded Sandlin's expectation of remaining in business for several years was reasonable and thus protected by the PMPA. See S. Rep. No. 731, 95th Cong., 2d Sess., at 18 ("essential" that federal legislation not "prevent fulfillment of the reasonable renewal expectations of franchisees"). Second, the majority label as "self-serving speculation" Sandlin's testimony that TRMI's retail price at the Getty station was occasionally less than TRMI's wholesale price to Sandlin. Opinion at 9. TRMI did not specifically refute or deny this testimony. I do not view this testimony as "speculation" when Sandlin certainly

possessed personal knowledge of both the price he paid TRMI for gas and the posted price at the station across the street. Belittling the significance of this testimony has a dual impact on Sandlin's case, because it is relevant to both his federal and state law claims.

Moreover, although the majority seem willing to disparage Sandlin's evidence, they offer no comment on certain evidence offered by TRMI that could, as easily, be disparaged. For instance, in attempting to establish the date by which rebranding was required, a TRMI witness testified that his only knowledge of the pertinent FTC order came from reading about it in the Wall

Street Journal and being advised about it by unnamed "members of management." Tr. at 185-86. Premature rebranding of the Getty station during the term of Sandlin's franchise could have been decisive on the issue of TRMI's breach of the implied covenant of good faith and fair dealing, yet TRMI was unable to offer any more authoritative evidence of the FTC's order. The majority acknowledge "the testimony of one witness who stated the rebranding of the Getty station took place earlier than necessary," but discard it as "self-serving speculation." Opinion at 9-10. They similarly reject other testimony by Sandlin. In my opinion, this

characterization of the evidence amounts to reweighing testimony and judging its credibility -- exercises that lie within the exclusive province of the jury.

Because I am convinced there was evidence, albeit very thin, upon which a jury could reasonably have based verdicts for Sandlin on both of his claims, and that we may not upset those verdicts without reweighing the evidence or speculating as to the jury's deliberations, I would affirm.

7421a

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BILL SANDLIN, Plaintiff/Appellee, v. TEXACO REFINING AND MARKETING, INC., Defendant/Appellant.	)	Nos. 88-1764 88-1874

ORDER

Filed May 16, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges.

This matter comes on for consideration of Appellee's Petition for Rehearing and Suggestion for Rehearing en Banc in the captioned case.

Upon consideration whereof, the Petition for Rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the Suggestion for Rehearing en Banc was transmitted to all of the Judges of the Court who are in regular active service. No member of the panel and no Judge in regular active service on the Court having requested that the Court be polled on Rehearing en Banc, Rule 35, Federal Rules of Appellate Procedure, the Suggestion for Rehearing en Banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

7417a

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

BILL SANDLIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-86-0132-T
	)	
TEXACO REFINING AND MARKETING, INC.,	)	
	)	
Defendant.	)	

ORDER

In accordance with the Tenth Circuit decision in Sandlin v. Texaco Refining and Marketing, Inc., ____F.2d ___ (10th Cir. 1990), the Judgment entered in favor of the Plaintiff and against the Defendant is vacated and judgment is entered in favor of the Defendant, Texaco Refining and Marketing, Inc. and against the Plaintiff Bill Sandlin on all claims.

IT IS SO ORDERED this 30th day of May, 1990.

UNITED STATES DISTRICT JUDGE

Entered in Judgment
Docket on May 30, 1990

7418a

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BILL SANDLIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-86-0132-T
	)	
TEXACO REFINING AND MARKETING INC.,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Defendant's Motion for Judgment Notwithstanding the Verdict. The plaintiff has responded. Furthermore, defendant has filed a reply.

Defendant, Texaco Refining and Marketing Inc., moves the Court pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for entry of judgment

notwithstanding the verdict on the ground that the plaintiff has failed to prove the essential elements of his claim and that defendant met its burden of proof on its affirmative defenses. A motion for judgment NOV is measured by the same standards as a motion for directed verdict:

> The question is not whether there is no evidence supporting the party against whom the motion is made, but whether there is evidence upon which the jury could probably find a verdict for that party. The court must view the evidence most favorably to the party opposing the motion and give that party the benefit of all reasonable inferences from the evidence. The underlying philosophy is one of minimizing interference with the jury.

Thompson v. Kerr-McGee Refining Corp., 660 F.2d 1380, 1389 (10th Cir. 1981).

Defendant raises several points in support of its motion. First, defendant

contends that there was no "implied covenant not to compete" in the contract in question. However, the jury was not instructed that there was. The jury was instructed as to the existence of the duty of good faith implied in every contract and the import of that covenant. As the Court recalls, defendant made no objections to the jury instructions as they were given. Applying the standard applicable to a motion under Rule 50(b), the Court finds that there was evidence from which a jury could properly find that Texaco had acted in a way to deprive plaintiff of his fruits of his contract which is contrary to the implied covenant of good faith. Likewise, with regard to defendant's claim that there was no evidence of improper motive, the

Court did not instruct the jury that such was necessary to find a breach of the implied covenant of good faith. The instructions given to the jury on the implied covenant of good faith were not objected to by the defendant, and the Court will not grant judgment NOV on that ground at this point.

Next, the defendant contends that there was no evidence as to the amount of damages with regard to the alleged breach of the implied covenant of good faith. Contrary to defendant's assertion, however, there was evidence that plaintiff's gallonage had decreased in the months following Texaco's rebranding of the Getty station. This, taken together with evidence of the growth of Sandlin's business and his average

profit margin on a gallon of gasoline, taken in the light most favorable to plaintiff, provides a basis for the jury's award of damages on the breach of contract claim.

Defendant also contends that judgment NOV should be granted on plaintiff's claim under the Petroleum Marketing Practices Act. Defendant goes into great detail regarding the law applicable to plaintiff's PMPA claim. Defendant obviously disagrees with the jury's resolution of the disputed issues regarding that claim. However, there was evidence supporting plaintiff's claim that the actual reason for nonrenewing plaintiff's franchise was one different from that contained in the PMPA notice. Once again, viewing the evidence

most favorably to the nonmoving party, and giving that party the benefit of all reasonable inferences from the evidence, the Court cannot say that a jury could not properly find for the plaintiff on the PMPA claim.

In light of the foregoing, Defendant's Motion for Judgment Notwithstanding the Verdict is in all things denied.

IT IS SO ORDERED this ___ day of March, 1988.

_____
UNITED STATES DISTRICT JUDGE

7420a

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BILL SANDLIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-86-0132-T
	)	
TEXACO REFINING AND MARKETING INC.,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Defendant's Motion for New Trial, or, in the Alternative, Motion for New Trial Unless Plaintiff Consents to Remittitur. Plaintiff has filed a response. Furthermore, defendant has filed a reply to the plaintiff's response.

Defendant moves the Court to grant a new trial on several grounds. First,

defendant contends that both of the verdicts are contrary to law, neither are supported by sufficient evidence, and both of the verdicts are against the weight of the evidence. Defendant also contends that the damages awarded by the jury are excessive, duplicative, and are not supported by the evidence nor in compliance with the instructions of the Court. Defendant also urges that the Court committed error by allowing the plaintiff to proceed first in the order of trial and to "mix" the claim involving the Petroleum Marketing Practices Act with the claim for breach of the implied covenant of good faith. Defendant also urges the Court that it committed error by admitting into evidence plaintiff's Exhibits 34 and 34A

and that this error justifies granting a motion for new trial. Finally, defendant complains of the statement made in plaintiff's opening statement to the jury which was allegedly in violation of this Court's order sustaining in part the defendant's motion in limine regarding inapplicable provisions of the P.M.P.A.

When a motion for new trial is presented, the Court is free to weigh the evidence for itself and need not view the evidence in the light most favorable to the nonmoving party. A motion for new trial made on the ground that the verdict of the jury is against the weight of the evidence normally presents a question of fact and not of law and is addressed to the discretion of the trial court. Harris v.

Quinones, 507 P.2d 533 (10th Cir. 1974). Furthermore, a trial court's denial of a motion for new trial will not be disturbed on appeal unless there is a showing of manifest abuse of discretion. Walter v. Warner, 298 F.2d 481 (10th Cir. 1962). A manifest abuse of discretion occurs only when the verdict is clearly, decidedly, or overwhelmingly against the weight of the evidence. Locke v. Atchison, Topeka & Santa Fe Ry., 309 F.2d 811, 817 (10th Cir. 1962).

The Court finds that the jury's award of damages is supported by the evidence and complies with the Court's instructions. The jury awarded $350,000 as compensatory damages under the P.M.P.A. Sandlin's evidence at trial was that he was receiving

a net income of between $30,000 and $35,000 a year on the operation of this station and that his business had been steadily increasing. Plaintiff's testimony was that he was doing a good job and that he had no complaints from his franchisor, Texaco. Sandlin testified that he expected to remain in business at least ten more years. The jury could have found that Sandlin was entitled to receive an award of compensatory damages equal to his expected net income over the period of time which he desired to remain in business. Indeed, the P.M.P.A.'s purpose is to protect a franchisee's expectations of renewal.

Sandlin's second claim was that Texaco breached the implied covenant of good faith implicit in his contract. The jury

returned a verdict of $175,000 for damages incurred by Sandlin during the last eleven months of his franchise relationship with the defendant. Sandlin testified that his business was growing between thirty and thirty-five percent every year, and as to his average profit margin on each gallon of gasoline sold. Sandlin also offered testimony as to the decrease in his sales and his purchases of gasoline from the defendant following Texaco's rebranding of the second station. These factors taken together support the jury's award for Sandlin's breach of contract claim.

With regard to defendant's contention concerning the order of proof, the Court finds that a new trial is not warranted by the Court's ruling that plaintiff should be

allowed to proceed first on both his claim under the P.M.P.A. and for breach of contract. The very authorities cited by defendant indicate that wide discretion is granted to the trial Court when circumstances of the case require an exception to the general rule that the party with the burden of proof should go first. Mr. Sandlin had two theories at trial. Allowing the defendant to put on its affirmative defense to one theory prior to Sandlin's being able to establish his case-in-chief with respect to the other was viewed by the Court as confusing to the jury. Presentation of the evidence in a simple chronological order was the best and most logical way for both claims to be presented to the jury.

The Court does not believe that admission of plaintiff's Exhibits 34 and 34A was error, and the reasons for the Court's decision to admit those exhibits are adequately explained on the record.

Defendant's next contention regarding plaintiff's counsel's remark in opening statement to the effect that defendant had violated a nonapplicable notice provision of the P.M.P.A. is slightly troublesome. At the time of opening statement, the Court had clearly ruled that plaintiff was to make no mention of the inapplicable provisions of the P.M.P.A. However, the Court finds it incredible that the jury would have rendered its verdict based on this statement alone in light of the evidence and the specific instructions

given regarding the applicable provisions of the P.M.P.A.

Finally, defendant urges the Court to order a remittitur and direct that there be a new trial if the plaintiff refuses to accept it. It is undoubtedly within the Court's power to grant a new trial when plaintiff refuses to accept a remittitur. However, as outlined above, the Court finds that the damages awarded by the jury are neither unsupported by the evidence nor excessive. Thus, defendant's alternative request that the Court order a remittitur is denied.

In light of the foregoing, Defendant's Motion for New Trial, or, in the Alternative, Motion for New Trial Unless Plaintiff Consents to Remittitur is in all things denied.

IT IS SO ORDERED THIS ____ day of March, 1988.

_____
UNITED STATES DISTRICT JUDGE

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